Remarks by the Attorney General's Office,
Senate Judiciary Committee (March 5, 2019)

Good Morning Madam Chair and Members of the Committee. My name is Stacey Schesser and I am the Supervising Deputy Attorney General in the Office of Attorney General Xavier Becerra. Thank you for the invitation to participate in today's informational hearing on the California Consumer Privacy Act, which I will refer to as the CCPA. The Attorney General plays an important role in promulgating regulations and in enforcing this new consumer protection law, and we welcome the opportunity to stay engaged with the legislature as it considers modifications to the law.

I am here today to discuss two components of the Attorney General's work on the CCPA. My testimony today will largely track the testimony I gave during the February 20th informational hearing before the Assembly Committee on Privacy and Consumer Protection, with some additional remarks in light of questions and comments that arose during that hearing.

First, I will provide the Committee with an update on our rulemaking activities. Second, I want to discuss the AG's policy concerns regarding the current language of the CCPA, as outlined in Attorney General Becerra's August 22, 2018 Letter to Assemblymember Chau and to Senator Hertzberg, the authors of AB 375. These concerns are the basis of Senate Bill 561, the Chair's bill introduced last week that responds to the Office's concerns about the CCPA. As part of my testimony today, I also renew the Attorney General's request for resources and funding so that we can meet our rulemaking deadlines and sustain vigorous oversight and effective enforcement of the privacy rights afforded by the CCPA.

At this time, I'd like to take a moment, on behalf of Attorney General Becerra, to thank the Chair, Asm. Chau, and Sen. Hertzberg for making a commitment last year to help DOJ with its CCPA funding needs. We thank them, the members of this Committee, the Speaker, the Pro Tem, and the Legislature for providing DOJ with 2018-2019 funding.

Pursuant to SB 1121, our Office must promulgate CCPA regulations by July 1, 2020. It is important to note that actions taken by the Legislature on CCPA that are signed into law by the Governor during this session may have an impact on our ability to meet this deadline. Since January 8, 2019, we have been holding Public Forums throughout the State as part of our preliminary activities in the rulemaking process. We have held six forums to date – San Francisco, San Diego, Riverside, Los Angeles, Sacramento, and Fresno – and our last forum is being held today, while we speak, at Stanford University.

Each Forum follows the same format: we provide a brief introduction of our Office's work, an overview of the Rulemaking Process as set forth in the California Administrative Procedures Act (or the APA), and various ways in which stakeholders and consumers can submit comments to our office for consideration during this pre-rulemaking stage. Pursuant to the express language in the CCPA found in Civil Code section 1798.185, the goals of these forums have been to solicit broad public participation and encourage the public to comment on what the regulations should address. We also specifically highlight a list of seven topics, as set forth in Civil Code section 1798.185, and request public comment on these specific areas because they reflect what we are prioritizing with regard to our July 2020 deadline and so the CCPA will be workable for businesses and consumers alike. In brief, the seven topics are whether the regulations should address:

(1) the categories of personal information,
(2) the definition of unique identifiers,
(3) any exceptions that should be established to comply with state or federal law,
(4) how consumers can submit a request to opt-out of the sale of personal information and how a business should comply with that opt-out request,
(5) what type of uniform opt-out logo or button should be developed to inform consumers about the right to opt-out,
(6) the notices and information that businesses must provide, including those related to financial incentive offerings, and
(7) how a consumer or their agent can submit a request for information to a business and how the business reasonably verifies these requests.

We then open up the Forum for anyone to speak. Again, because both the CCPA and the APA set forth that the Department's role at this preliminary stage is to listen and seek broad public participation, we do not provide responses to those public comments and we do not ask or answer any substantive questions during the Forum. Indeed, this is why we have held numerous forums as well as added an additional forum at Stanford: to give the public as many opportunities to provide feedback directly to us on what the CCPA regulations should address.

The attendance and participation has varied at the forums; for example, our first forum in San Francisco had nearly 200 attendees, but only 14 speakers. The more recent forums in Los Angeles and Sacramento have had much higher speaker participation, featuring comments from the ad-tech industry, privacy advocates, consumers, and small business. We encourage every speaker, forum attendee, and the general public, including your constituents, to submit written comments directly to us. The public has and is continuing to submit these

comments to us via email or mail and may do so until this Friday, March 8, 2019, for consideration during this preliminary, pre-rule stage. We encourage businesses and individuals throughout California to not miss this opportunity to participate in the pre-rule stage, and submit their comments before the deadline at the end of this week.

In addition, we have created numerous ways for the public to stay engaged by dedicating a portion of our website to the CCPA, maintaining an email subscription list to publicize upcoming events, and posting our rulemaking materials and all event information on our website. We have also emphasized that we are only at the beginning of our rulemaking process and that the public will continue to have more opportunities to participate.

We anticipate entering into the formal rulemaking period in the Fall of 2019. The formal rulemaking process will begin when we publish our Notice of Proposed Regulatory Action, which will include an Initial Statement of Reasons and a draft Text of the Regulations. The formal rulemaking process will include additional public hearings, receipt and consideration of public comments, responses to these comments, and any potential changes to the text of the regulations. We once again encourage your constituents to submit comments during this formal stage of rulemaking. Although the timeline is tight, we will continue to work diligently to meet the statutory deadline of July 1, 2020.

This leads to the second component of my testimony. As the Attorney General stated in his August 22, 2018 letter, "providing Californians with privacy protections is critically important now more than ever. However, the CCPA as it currently applies to the Attorney General's Office presents unworkable obligations and serious operational challenges." As Attorney General Becerra further stressed,

failure to cure these identified flaws will undermine California's authority to launch and sustain vigorous oversight and effective enforcement of the CCPA's critical privacy protections. We appreciate the Legislature addressing some of these concerns last year via SB 1121, however, three still remain. This is why we partnered with you, Senator Jackson, to sponsor Senate Bill 561—needed legislation that would address these flaws that I am about to discuss, and both strengthen and helpfully clarify the CCPA.

First, the CCPA allows any businesses and third parties to seek guidance directly from the Attorney General on how to comply with the law. Asking the Attorney General's office to provide legal counsel at taxpayers' expense directly conflicts with our constitutional obligation to investigate and enforce the law against entities that violate those laws. Our obligation is to protect the privacy rights of the People of the State of California – not the businesses that violate these laws. Any use of public funds to provide unlimited legal advice to private parties would be unfair and unconscionable, not to mention a waste of valuable state resources. Accordingly, SB 561 deletes the provision allowing businesses to seek legal opinions from the Attorney General, and instead authorizes the Attorney General to publish materials that provide businesses and others with general guidance on how to comply with the CCPA. The Attorney General has, on past occasions, voluntarily developed and published general guidance on various laws, including AB 450 from 2017, a bill on immigration worksite enforcement actions. This bill, SB 561, would codify our ability to provide some general guidance. Moreover, the regulations that the Attorney General intends to issue by July 1, 2020 will also provide guidance for how to comply with the CCPA.

Second, the CCPA provides a business with a right to cure any alleged violation before being held accountable by our Office for

breaking the law. This would essentially be a "get out of jail free" card. Businesses would be permitted to violate the law – even knowingly – and the Attorney General would have no ability to initiate an enforcement action without giving the business notice and the opportunity to cure the violation. This would not only fundamentally alter how our Office investigates and prosecutes corporate misconduct, but it would dramatically hinder our constitutional duty to protect the rights of the People of California. Every day, we are seeing companies being careless with Californians' personal information and data, and we have seen companies who knowingly avoid compliance with the law brought to justice. The CCPA's right to cure would allow even the worst offenders to receive a pass, rather than allowing the Attorney General to use his prosecutorial discretion in enforcing the law. Giving businesses the opportunity to have a "fix-it" ticket disadvantages both consumers and honest businesses that are playing by the rules. For these reasons, SB 561 would repeal the right-to-cure provision with respect to AGO enforcement under the Act.

Third, the CCPA lacks a private right of action that would allow Californians the ability to enforce the rights conferred by this groundbreaking law. Instead, the Act includes only a limited right to sue if a consumer becomes a victim of a data breach. Private rights of action provide a critical adjunct to government enforcement, and they ensure that consumers can assert their rights and seek appropriate remedies. ~~oc~~Therefore, the Attorney General urges you enact SB 561, which seeks to expand the CCPA private right of action to include violations of the key rights provided by this Act.

Finally, we want to once again thank the Chair, Asm. Chau, Sen. Hertzberg, the Speaker, the Pro Tem, and the Legislature for providing DOJ with 2018-2019 funding. We also want to thank Governor Newsom for including in his 2019-2020 budget proposal the amount DOJ requested for the ongoing costs of CCPA implementation and

enforcement. We would once again appreciate the Legislature's support for the amount as provided in the Governor's budget.

At this point, I look forward to answering any questions about my testimony today. While I am happy to discuss our rulemaking activities thus far or the Attorney General's policy concerns, because we are in the midst of drafting the regulations, I cannot opine on the interpretation of the CCPA or its eventual enforcement. Thank you.